PP

v.

SHARI MOHD SHARIFF

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CRIMINAL APPEAL NO: 42-89-2002]
10 JANUARY 2005

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Sentence of 12 years imprisonment and six strokes of rotan on each of two charges of statutory rape under s. 376 Penal Code - Plea of guilty by accused - Principles applicable - Whether sentences manifestly inadequate*

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Sentence of 12 years imprisonment and six strokes of rotan on each of two charges of statutory rape under s. 376 Penal Code - Both offences committed within two months at same place on same complainant under same section - Principles applicable - Totality principle - Whether trial judge exercised discretion correctly*

This was an appeal by the learned public prosecutor against the decision of the learned sessions court judge ('the trial judge') imposing a sentence of 12 years imprisonment and six strokes of the rotan on each of two charges of rape under s. 376 of the Penal Code against the accused, who had pleaded guilty to both charges of raping his 12-year old daughter. The trial judge also ordered the imprisonment term to run concurrently. The appellant argued that the sentence, having regard to the facts of the case, was manifestly inadequate. The appeal raised two issues for determination *viz*: (i) where an accused had pleaded guilty to and been convicted of two charges of statutory rape of his 12-year old daughter under s. 376 of the Penal Code, whether a sentence of 12 years imprisonment and six strokes of the rotan on each of the charges was manifestly inadequate; and (ii) where an accused had been sentenced to 12 years imprisonment on each of the two charges in the same proceeding and the dates of the commission of the offences were within two months of each other, whether there was an error of law for the trial judge to order the sentences to run concurrently instead of consecutively.

Held (dismissing the appeal):

[1] Reverting to the sentences meted out by the trial judge herein, the trial judge had seen the danger of imposing the maximum sentence of 20 years and decided in favour of taking into account the guilty plea in imposing the sentence of 12 years imprisonment. The trial judge's judgment was well considered and had taken into account all the relevant facts and circumstances of the case presented before him. He had indeed considered all the relevant established judicial principles and authorities in arriving at the sentences that were not manifestly inadequate. (p 445 a-b)

[2] The trial judge had correctly exercised his discretion by applying the totality principle and also by referring to all the established judicial principles. He had not occasioned any misdirection when he ordered the sentences of 12 years imprisonment to run concurrently, as consecutive sentences would have offended the totality principle in that the total sentence to be served would extend to 24 years *ie*, four years in excess of the statutory maximum under s. 376 of the Penal Code, and as the two offences were committed within two months at the same place on the same complainant under the same section. (p 448 e-g)

Case(s) referred to:

Abu Seman v. PP [1982] 2 MLJ 338 ***(refd)***
Amrita Lal Hazra v. Emperor 42 Cal 957 ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(foll)***
Chin Choy v. PP [1955] MLJ 236 ***(refd)***
Crowley and Garner v. R [1991] 55 A Crim R 201 ***(refd)***
Gek Sing Kaliappan v. PP [1999] 4 CLJ 292 HC ***(refd)***
Hashim Pawanchee & Anor v. PP [1988] 2 MLJ 66 ***(refd)***
Hj Johari Hj Abdul Karim v. PP [1989] 2 MLJ 276 ***(refd)***
Ismail Rasid v. PP [1999] 4 CLJ 402 HC ***(refd)***
Jamaluddin Langkiau (Criminal Appeal No: K-42-03-2002) (Unreported) ***(foll)***
Jayaraman & Ors v. PP [1979] 2 MLJ 88 ***(refd)***
Maideen Pillai v. PP [1996] 1 SLR 161 ***(refd)***
Marimuthu Balakrisnan v. PP [1974] 2 MLJ 145 ***(refd)***
PP v. Chot Saik Kam [1991] 1 MLJ 193 ***(refd)***
PP v. Ng Chong Wan [1988] 2 CLJ 833; [1988] 2 CLJ (Rep) 278 HC ***(refd)***
PP v. Pretum Singh Lall Singh [2004] 6 CLJ 521 HC ***(refd)***
PP v. Teoh Heng Chye [1989] 3 MLJ 205 ***(refd)***
PP v. Wong Kok Sein & Ors [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630 HC ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC ***(refd)***
PP v. Yap Koon Mong [1999] 4 SLR 257 ***(refd)***
R v. Faulkner [1972] 56 Cr App R 594 ***(refd)***
R v. Saleem [1964] Crim LR 482 ***(refd)***

R v. Sheatley [1983] 5 Cr App R (S) 417 ***(refd)***
R v. Skinner [1986] 8 Cr App R (S) 166 ***(refd)***
R v. Walsh [1965] Crim LR 248 ***(refd)***
Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC ***(refd)***
Rex v. Leo De Cruz [1935] MLJ 1 ***(refd)***
Rex v. Teo Cheng Lian [1949] MLJ 170 ***(refd)***
SA Jamil Md Yusof [2002] 7 CLJ 132 HC ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 282(d), 292(i)
Penal Code, ss. 375(f), 376
Subordinate Courts Act 1948, s. 102

Criminal Procedure Code [Sing], s. 18

Other source(s) referred to:
DA Thomas, *Principles of Sentencing*, 2nd edn, pp 57-58
Emmins on Sentencing, 2nd edn, p 151

For the prosecution - Roslan Abu Bakar DPP
Respondent in person

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the learned public prosecutor against the decision of the learned sessions court judge of Kuala Pilah ("the trial judge") who had on 15 April 2002 imposed a sentence of 12 years imprisonment from the date of arrest ie, 10 August 2001, and six strokes of the rotan on each of the two charges against the accused. These charges read as follows:

Pertuduhan Pertama:

Bahawa kamu pada 3hb. Jun 2001 antara jam 12.00 tengahari sehingga jam 7.00 petang di rumah No: 251, Blok L, Felda Serting 3, Air Hitam di dalam Daerah Jempol di Negeri Sembilan telah merogol ABC, K/P No: XYZ. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

Pertuduhan Kedua:

Bahawa kamu pada 3hb. Ogos 2001 antara jam 5.30 petang sehingga jam 6.30 pagi di rumah No: 251, Blok L, Felda Serting 3, Air Hitam di dalam Daerah Jempol di Negeri Sembilan telah merogol ABC, K/P No: XYZ. Oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

[My translation:

First Charge
That you on 3 June 2001 between 12 noon and 7pm at house No. 251, Block L, Felda Serting 3, Air Hitam in the district of Jempol in Negeri Sembilan did rape ABC, NRIC No. XYZ and that you have thereby committed an offence punishable under s. 376 of the Penal Code.

Second Charge
That you on 3 August 2001 between 5.30pm and 6.30am at house No. 251, Block L, Felda Serting 3, Air Hitam in the district of Jempol in the state of Negeri Sembilan did rape ABC, NRIC No. XYZ and that you have thereby committed an offence punishable under s. 376 of the Penal Code.]

I have deleted the name and NRIC No. of the complainant in order to protect her anonymity.

These charges concern the offences of statutory rape where the consent of the complainant is irrelevant: s. 375(f) of the Penal Code.

Factual Background

The accused is the father of the complainant who was at the time of the offence his 12-year-old daughter. He had pleaded guilty to both the charges.

The facts of the case revealed that on 3 June 2001 between 12 noon and 7pm, the accused had sexual intercourse in the room of the complainant's sister at house No. 251 Block L, Felda Serting 3, Air Hitam, Jempol. The accused had applied cooking oil at the complainant's private part and subsequently inserted his private part thereto, thereby resulting in the bleeding of the complainant's private part.

The complainant had narrated the incident to her 13-year-old sister who in turn informed their mother. The accused had denied the episode when confronted by the complainant's mother ie, the accused's wife.

On 3 August 2001, the accused repeated the episode, but this time the venue was the hall of the house, after which the complainant had escaped to the house of her mother's adopted sister. The complainant lodged Air Hitam police report No. 547/2001.

On 11 August 2001, the complainant was examined at the Kuala Pilah Hospital and the result was: "hymen not intact with minimal injuries at vulva area".

Upon the admission by the accused of these facts, his plea was accepted by the trial judge who recorded a conviction on each of the two charges against the accused. The aforesaid sentences were meted out by the trial judge who also ordered the imprisonment term to run concurrently.

Grounds Of Appeal

In essence, En. Roslan bin Hj. Abu Bakar, learned deputy public prosecutor, argued that the sentence imposed by the trial judge was manifestly inadequate, having regard to the facts of the case, especially where the complainant was the accused's 12-year-old daughter, in that the trial judge has failed to consider public interest, besides the disintegration of the family unit.

He added that the accused had a previous conviction recorded on 21 October 1996 for being in possession of stolen motorcycle and was sentenced to six months' imprisonment with effect from 21 September 1996.

The accused appeared in person, both in the trial court and in this appeal. In his plea in mitigation, he prayed for the most lenient sentence, to run concurrently, as he was illiterate and a building contract worker having 8 children and a non-working wife.

Issues For Determination

This appeal raises two issues for determination *viz*:

1. Where an accused has pleaded guilty to and been convicted of two charges of statutory rape on his 12-year-old daughter under s. 376 of the Penal Code, are the sentences of 12 years imprisonment and six strokes of the rotan on each of the charges manifestly inadequate ("Issue 1")?

2. Where an accused has been sentenced to 12 years imprisonment on each of the two charges in the same proceedings and the dates of the commission of the offences are within two months of each other, was there an error of law for the trial judge to order the sentences to run concurrently instead of consecutively ("Issue 2")?

Are The Sentences Manifestly Adequate?

In dealing with Issue 1, I shall make specific reference to three decisions of our High Court and one decision of the Singapore Court of Appeal, in which respective sentences have been handed down against the accused who had been convicted of statutory rape against their respective daughter under s. 376 of the Penal Code. These cases are:

1. In *PP v. Pretum Singh Lall Singh* [2004] 6 CLJ 521, the father who was charged in the sessions court claimed trial to and was acquitted of raping his 14-year-old daughter. On appeal, RK Nathan J (as he then was) set aside the acquittal, recorded a conviction and sentenced the father to the maximum sentence of 20 years imprisonment and 15 strokes of the rotan.

2. *Ismail Rasid v. PP* [1999] 4 CLJ 402, where the father had pleaded guilty to two charges of raping his 14-year-old daughter and was sentenced to 12 years imprisonment and three strokes of the rotan on each of the charges, the imprisonment term was to run concurrently. The father appealed against the sentence. The question which arose for determination there was whether the appellate court ought to enhance the sentence instead. KN Segara J considered it as a classic case where no discount should be given to the father and substituted it with five strokes of the rotan and a maximum sentence of 20 years imprisonment on each of the two charges; the sentences to run from the date of the arrest ie, concurrently.

3. However, in *Jamaluddin bin Langkiau*, Kota Kinabalu Criminal Appeal No. K-42-03-2002 (unreported) Ian HC Chin J saw the danger in imposing the maximum sentence in cases where the accused has pleaded guilty because such a sentence would render it pointless for an accused person to plead guilty since he stands in the same position as an accused who does not plead guilty, and added that in fact, the accused is in a worse position because the one who does not plead guilty has a chance of being acquitted, which the accused who pleaded guilty would not have.

4. In *PP v. Yap Koon Mong* [1999] 4 SLR 257, the father pleaded guilty to, *inter alia*, three counts of raping his 9-year-old daughter. The High Court in Singapore sentenced the father to five years imprisonment on each count. Upon appeal by the prosecution, the Court of Appeal enhanced the five-year imprisonment to 15 years on each count.

Reverting to the sentences meted out by the trial judge herein, it is to be noted that the trial judge has apparently followed the judgment of Ian HC Chin J in seeing the danger of imposing the maximum sentence of 20 years and decided in favour of taking into account the guilty plea in imposing the 12 years imprisonment.

I have the opportunity of reading the well-considered judgment of the trial judge who has taken into account all the relevant facts and circumstances of the case presented before him. He has indeed considered all the relevant established judicial principles and the aforesaid authorities in arriving at the sentences which I hold are not manifestly inadequate.

Statutory Provisions Governing Sentences Of Imprisonment

In relation to Issue 2, it is necessary to examine the relevant statutory provisions governing sentences of imprisonment. In this regard, s. 282(d) of our Criminal Procedure Code provides that such sentence shall take effect from the date on which it was passed unless the court passing the sentence otherwise directs. Under this provision, the sentencing court has a discretion to order concurrent or consecutive sentences.

For brevity and convenience a reference hereinafter to a section is a reference to that section in our Criminal Procedure Code unless the context otherwise requires.

Although s. 292(i) provides that when eg, a person who is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct. Section 292(i) gives the sentencing court a limited discretion to order the commencement of the sentence on such convicted person, either immediately or at the expiration of the imprisonment to which he has been previously sentenced. This provision applies only where a person is currently undergoing a sentence of imprisonment, in which case the subsequent sentence of imprisonment may run concurrently with the existing sentence of imprisonment or consecutively thereto. The facts of the instant appeal do not appear to fall within the ambit of s. 292(i) as the accused is not currently undergoing a sentence of imprisonment.

Section 102 of the Subordinate Courts Act 1948 confers upon the magistrate's court (but not the sessions court) the power to inflict concurrent or consecutive sentences in case of conviction for several offences at one trial, in the following words:

102. Sentence in case of conviction for several offencs at one trial

When a person is convicted at one trial of any two or more distinct offences a Magistrates' Court may sentence him for those offences to the several punishments prescribed therefor which the court is competent to inflict, the punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, or to run concurrently if the court shall so direct, but it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of one single offence, to send the offender for trial before a higher court:

Provided that:

(a) in no case shall the person be sentenced to periods of imprisonment amounting in the aggregate to more than twenty years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the court in the exercise of its ordinary jurisdiction is competent to inflict; and

(c) when imprisonment is directed in default of payment of a fine or of costs or compensation ordered under the authority of any law for the time being in force, the imprisonment shall be consecutive to any other term or terms of imprisonment so directed and to any sentence of imprisonment otherwise imposed.

Where there are two separate proceedings, s. 102 has no application as it refers only to "at one trial": see *SA Jamil Md Yusof* [2002] 7 CLJ 132 per Syed Ahmad Helmy JC (now J).

Section 18 of the Singapore Criminal Procedure Code (Cap. 68) contains specific provisions dealing with the inflicting of consecutive sentences in certain cases in the following words:

Where at one trial a person is convicted and sentenced to imprisonment for at least 3 distinct offences, the court before which he is convicted shall order that the sentences for at least two of those offences shall run consecutively.

In Malaysia, we have no such provision which in any event would only apply where at one trial a person has been convicted and sentenced to imprisonment for at least three distinct offences.

Concurrent Or Consecutive?

The principles governing the imposition of concurrent or consecutive sentences have been succinctly stated in *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 at p. 579b by Augustine Paul JCA who delivered the judgment of the Court of Appeal and may be enumerated as follows:

1. In deciding whether the terms of imprisonment should be concurrent or consecutive, the court should be guided by the one transaction rule and the totality principle;

2. Pursuant to the one transaction rule, where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive: *R v. Saleem* [1964] Crim. LR 482; *R v. Walsh* [1965] Crim. LR 248; *Abu Seman v. PP* [1982] 2 MLJ 338 at p. 343 Chong Siew Fai J (later CJ (Sabah & Sarawak); *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645; *Abu Seman v. PP, supra*; *Hashim bin Pawanchee & Anor v. PP* [1988] 2 MLJ 66; *Haji Johari bin Haji Abdul Karim v. PP* [1989] 2 MLJ 276; *PP v. Wong Kok Sein & Ors* [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630; *Sau Soo Kim v. PP, supra;* and *PP v. Ng Chong Wan* [1988] 2 CLJ 833; [1988] 2 CLJ (Rep) 278 in *Gek Sing Kaliappan v. PP* [1999] 4 CLJ 292 per Vincent Ng J.

3. For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design: *Jayaraman & Ors v. PP* [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal. 957; *Chin Choy v. Public Prosecutor* [1955] MLJ 236; and *SA Jamil Md Yusof v. PP* [2002] 7 CLJ 132.

4. The one transaction rule is, however, not absolute, as there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: *R v. Sheatley* [1983] 5 Cr. App. R (S) 417 and *R v. Skinner* [1986] 8 Cr. App. R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence;

5. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his records and prospects: DA Thomas in "*Principles of Sentencing"* (2nd edn) pp 57-58; *Wong Kai Chuen Philip v. PP, supra*; and *Kanagasuntharam, supra;* and *Maideen Pillai v. PP* [1996] 1 SLR 161;

6. Sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour: *Emmins on Sentencing,* 2nd edn. p. 151;

7. There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account: *Crowley and Garner v. R* [1991] 55 A Crim. R 201;

8. A richly deserved sentence, not manifestly excessive, should not be disturbed just because the person upon whom the sentence is imposed may feel crushed by it: per O'Bryan J in Crowley and *Garner v. R, supra,* at p. 301;

To the above principles, the following may be added:

9. The question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case: *Sau Soo Kim v. PP* [1975] 2 MLJ 134, per Lee Hun Hoe CJ (Borneo) (as he then was) whose judgment was read by Suffian LP (as he then was);

10. The totality principle requires the court to consider whether the aggregate is just and appropriate and to ensure that the sentence is not excessive: *R v. Faulkner* [1972] 56 Cr. App R. 594; *PP v. Teoh Heng Chye* [1989] 3 MLJ 205; *PP v. Chot Saik Kam* [1991] 1 MLJ 193; *Marimuthu Balakrisnan v. PP* [1974] 2 MLJ 145.

Reverting to the facts before the trial judge and now before me in this appeal, I am of the view that the trial judge has correctly exercised his discretion by applying the totality principle and also by referring to all the established judicial principles. He has taken into account all the relevant facts and circumstances and has correctly analysed the one transaction principle and the totality principle, after which he has applied the totality principle. In my view he has not occasioned any misdirection in the exercise of his discretion when he ordered the sentences of 12 years imprisonment to run concurrently, as consecutive sentences would have offended the totality principle in that the total sentence to be served would extend to 24 years ie, four years in excess of the statutory maximum under s. 376 of the Penal Code, as the two offences were committed within two months at the same place on the same complainant under the same section.

Functions Of Appellate Court

It is trite law that an appellate court will not interfere with the decision of the court below on the question of sentence unless eg:

1. the trial judge has proceeded on wrong principles: *Rex v. Leo De Cruz* [1935] MLJ 1 CCA per Huggard CJ;

2. there is manifest error, either in law or in considering the facts and circumstances, or an omission to consider such facts and circumstances: *Rex v. Teo Cheng Lian* [1949] MLJ 170 per Gordon-Smith J; or

3. an essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice: per Mohamed Azmi SCJ (as he then was) in *Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC.

Conclusion

As the trial judge has correctly exercised his discretion in imposing the sentence, I can find no merit in this appeal which I hereby dismiss and the sentence imposed by the trial judge is affirmed.